No. 97 - 1485

Supreme Court of the United States

October Term 1997

Philp Coates, Director of the Massachusetts Division of Marine Fisheries, Et Al..

Petitioners,

v.

Richard Max Strahan

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIEST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF ISSUES PRESENTED

1. Does a Federal court possess jurisdiction under the Endangered Species Act. 16 U, S. C. §§ 1631 et seq., to issue injunctive relief to enjoin individuals acting as state and municipal officials from issuing licenses in the course of their official duties that authorizes activities that directly result in the incidental taking of listed species of wildlife in violation of Sections 9(a)(1)(B) and 9(g) of the Act. 16 U. S. C.. §§ 1538(a)(1)(B) and 1538(g).

2. Does the Tenth Amendment of the Constitution of the United States immunize individuals, when acting in their official capacity as state officials, when a Federal court has determined that they are in violation of the ESA's Section 9(a)(1)(B) and Section 9(g) prohibitions against the taking of listed species of wildlife, intentionally or incidentally, from being coerced by a Federal court into implementing regulations that will amend the violating activity so that it will be in compliance with the federal regulatory scheme for the conservation of listed species of endangered wildlife.

STATEMENT OF THE CASE

Respondents commenced the action in the District Court because the Petitioners refused despite numerous requests of the Respondent to cease licensing and regulating the deployment of fishing gear in United States coastal waters, that are under the concurrent state jurisdiction of Massachusetts, despite knowing that listed endangered species of whales were repeatedly becoming entangled in this fishing gear, and as a consequence were being seriously injured and killed as a result. The Respondent commenced his civil action to enjoin the Petitioners from further licensing the deployment of said fishing gear until they were willing to do so in a manner that was safe for listed species of whales and would not result in these endangered whales becoming entangled in their licensed fishing gear.

The Respondents are perpetrators of environmental crimes and are knowing, and willing, violators of the Section 9(a)(1)(B) take prohibitions of the ESA. Until this action was commenced in the lower court, they had consistently refused all requests by the Respondent and others to conduct their regulation and licensing of marine fisheries activities in a manner that prevented listed species of whales from becoming entangled in the fishing gear whose deployment in United States coastal waters that they licensed and regulated other individuals to do.

Contrary to statements made *post hoc* in their petition for certiorari to the Court, they never once adopted any regulation to require that the marine fisheries activities that they license were conducted in a manner that protected listed species of whales from becoming entangled in the fishing gear that they licensed individuals to deploy in United States coastal waters. They formally refused very request to do so when they were formally petitioned by the Respondent to do so.

Just as they are in standing violation of the Section 9(a)(1)(B) take prohibitions of the ESA for causing the entanglement of listed species of whales as a result of their licensing and regulating of marine fisheries activities, they are also in violation of the take prohibitions of Massachusetts wildlife laws. The Massachusetts Endangered Species Act

("MESA") was passed by the state legislature in 1990 and was directly modeled on the Federal ESA. MESA also prohibits the incidental taking of listed species. MESA required that all species listed by the Federal government as endangered pursuant to the ESA were also to be included on the State list of endangered species established under MESA. The Northern Right Whale, Humpback Whale, and all other species that the Respondent sought to protect in his action are listed by Massachusetts, pursuant to MESA, as listed endangered species native to Massachusetts.

The Appeal Court erred in affirming the District Court's refusal to enjoin the Respondents' unlawful taking of listed species of whales. The District Court impressively chose to do little but simply coerce the Respondents into adopting regulations to amend their marine fisheries activities on a simple claim that it would to some degree mitigate their adverse impact on listed species of whales.

In so doing the District Court ordered through implicit coercion that the Petitioners were to either regulate their marine fisheries activities in support of the federal regulatory scheme for the protection and conservation of endangered species. It was improper for the District Court to do this, and for the Appeal Court to affirm the lower court's decision, for such coercion is in violation of the Tenth Amendment of the Constitution.

However, the Petitioners voluntarily did so, and never once refused to do so. They could have simply presented the required conservation plan and nothing else. The District Court required in no way that they do more. Whatever regulations that they adopted they did so voluntarily and have no basis to appeal such voluntary actions on their part, and whatever they have they have certainly have waived.

The Court should deny their petition.

1. *Does a Federal court possess jurisdiction under the Endangered Species Act, 16 U, S. C. §§ 1631 et seq., to issue injunctive relief to enjoin individuals acting as state and municipal officials from issuing licenses in the course of their official duties that authorizes activities that directly result in the incidental taking of listed species of wildlife in violation of Sections 9(a)(1)(B) and 9(g) of the Act. 16 U. S. C.. §§ 1538(a)(1)(B) and 1538(g).*

It does.

2. *Does the Tenth Amendment of the Constitution of the United States immunize individuals, when acting in their official capacity as state officials, when a Federal court has determined that they are in violation of the ESA's Section 9(a)(1)(B) and Section 9(g) prohibitions against the taking of listed species of wildlife, intentionally or incidentally, from being coerced by a Federal court into implementing regulations that will amend the violating activity so that it will be in compliance with the federal regulatory scheme for the conservation of listed species of endangered wildlife.*

It does.

CONCLUSION

For the above stated reasons, the Court should deny the Petitioners petition for writ of certiorari.

Respectfully Submitted,

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Date: April 9, 1998